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No. 84-415

In The

Supreme Court of the United States

October Term, 1984

LESLIE C. CASE,

Petitioner,

v.

BASF WYANDOTTE CORPORATION and
NATIONAL GYPSUM COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RESPONDENT BASF WYANDOTTE CORPORATION'S BRIEF IN OPPOSITION

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October 18, 1984

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QUESTIONS PRESENTED FOR REVIEW

There are no questions in this case which merit review by the Court. The five "questions presented" by Petitioner are simply a guise by which he seeks to have this Court review every grievance he has raised since the start of this litigation, from the early discovery disputes, through trial, decision on the merits and the Court of Appeals' plainly proper, unanimous decision that the District Court did not abuse its discretion in denying Petitioner's Rule 60(b) motion to vacate and to reenter judgment.

STATEMENT PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of this Court, respondent BASF Wyandotte Corporation states that it is a wholly-owned sub-

sidiary of BASF Aktiengesellschaft, a foreign corporation, in Ludwigshafen-Rhine, West Germany. It has no subsidiaries or affiliates.

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I. COUNTERSTATEMENT OF THE CASE

A. Introduction

Petitioner, Dr. Case, for the first time, argues in his Petition that his complaints about the conduct of the District Court and the Court of Appeals raise

constitutional issues. No such constitutional issues were presented either to the District Court or to the Court of Appeals.

Stripped of their constitutional rhetoric, Petitioner's arguments boil down to a disagreement with the decision on the merits by the District Court and an assertion that the District Court abused its discretion in denying his motion under F.R.Civ.P. 60(b). Petitioner rests his arguments on unsupported and unsupportable allegations of misconduct below. The District Court and the Court of Appeals, which had full access to the record and the opportunity to observe the Petitioner, rejected those allegations. There is no reason for this Court also to consider them.

B. The Proceedings Below

Petitioner commenced this action on December 9, 1975, charging Respondents with patent infringement. Later, he amended his complaint to allege unspecified antitrust violations. After extensive discovery and pretrial proceedings, the Court heard the evidence in a six-day bench trial.

The District Court entered its decision on August 31, 1983. It correctly held that Respondents had not infringed Petitioner's patents and that Petitioner had failed to prove his antitrust allegations.* The Court did not decide the issue of patent validity, but did note that, were it to accept the definition of the patent claims urged by Petitioner, "it is quite likely" that the claims would have been invalid.

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* A copy of the District Court's Memorandum is attached hereto as an Appendix.

Having found non-infringement, the District Court said nothing about the unrebutted evidence that, during the prosecution of his patents, Petitioner had submitted improper experimental data to the Patent Office and had withheld other material data from the Patent Office -- evidence which demonstrated both the invalidity and unenforceability of those patents.

The District Court correctly determined that Petitioner's antitrust charges had no substance; they were "highly speculative" and "not reinforced by credible evidence".

Counsel for respondent BASF Wyandotte Corporation ("Wyandotte") received its copy of the Court's decision by mail on September 6, 1983 and counsel for co-defendent and co-respondent National Gypsum Company received its copy by mail on September 7. On September 8, Respond-

ents checked the District Court docket sheets and confirmed that judgment had been entered on August 31.

On September 12 and 19, respectively, the District Court's Memorandum Decision was excerpted in two legal reporters, 11 Massachusetts Lawyers Weekly 1522 and 1983-2 Trade Cas. (CCH) ¶ 65,600.

On November 14, 1983, counsel for Wyandotte wrote to Petitioner about disposition of documents produced to each side under a Protective Order, "now that this action has been terminated."

On November 25, 1983, Petitioner filed a motion pursuant to F.R.Civ.P. 60(b) requesting that the District Court vacate and reenter the August 31, 1983 judgment. Petitioner claimed that he had not received notice of entry of judgment. He further alleged that he had checked the docket sheet on November 23, 1983, and at that time first discovered

entry of the Court's decision. Based on this asserted "failure of communication", Petitioner sought reentry of judgment for purposes of appeal.

Respondent Wyandotte opposed Petitioner's motion on the grounds that Petitioner had not been diligent in ascertaining the status of his action, that no misrepresentation had been made to him about the docket entries or the status of the action, and that Respondents would be prejudiced by reentry of judgment.

Petitioner responded with two supplemental memoranda in which he argued that there was "irregularity" in the filing and docketing of certain of Wyandotte's post-trial papers in the case. Respondent Wyandotte answered these charges by establishing that the papers were properly and timely filed.

On January 3, 1984, the District Court denied Petitioner's motion.

Petitioner filed a Notice of Appeal to the Court of Appeals for the Federal Circuit on January 9, 1984, appealing both from the District Court's August 31, 1983 judgment and from its January 3, 1984 denial of his Rule 60(b) motion. Petitioner also filed a petition for writ of mandamus directing the District Court to vacate and reenter its judgment. Respondents' motion to dismiss Petitioner's appeal on the merits from the August 31 judgment was deferred pending briefing and oral argument on all issues raised by Petitioner.

In his appeal briefs, Petitioner argued in detail why he disagreed with the District Court's holdings that Respondents had not infringed Petitioner's patents and had not violated the antitrust laws, and why he disagreed with the

District Court's conduct of the pretrial proceedings. In his petition for writ of mandamus, Petitioner argued that the District Court's decision on Petitioner's Rule 60(b) motion was an abuse of discretion. In both his petition and appeal briefs, Petitioner recited a long list of what he referred to as "irregularities" and "systematic abuses" in the District Court -- the same ones he attempts to have reviewed here. Wyandotte in its briefs dealt with each of these unfounded allegations.

Petitioner presented oral argument to the Court of Appeals both on his appeal on the merits from the August 31, 1983 judgment and on his various contentions about misconduct by the Court below and the denial of his Rule 60(b) motion. With respect to his Rule 60(b) motion, the Court of Appeals pointed out to Petitioner that he never alleged that he

had checked the District Court records within 30, or even 60, days of the decision on the merits on August 31, 1983. In response, Petitioner "admitted that he might have been somewhat remiss in checking the records around that time."*

On July 3, 1984, the Court of Appeals rendered a per curiam decision** in which it dismissed Petitioner's appeal on the merits as untimely and denied his petition for writ of mandamus. Based on the factual record and oral argument, the Court of Appeals properly determined that "[t]he district court did not abuse its discretion in denying the motion [under Rule 60(b)] in this case." 737 F.2d at 1035.

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* Case v. BASF Wyandotte, 737 F.2d 1034, 1035 (Fed.Cir. 1984).

** Id.

II. REASONS FOR DENYING THE WRIT

Petitioner has been afforded due process of law.

The Petition simply recapitulates the unsupported and unsupportable allegations which this experienced litigator unsuccessfully advanced in the District Court and the Court of Appeals.*

Petitioner received a full and fair trial on the merits of his patent and antitrust claims and he had a full opportunity to brief and argue his appeal on the merits. He has no legitimate basis upon which to attack the decision or the integrity of the District Court. His accusations of misrepresentation, irregu-

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* This is the second Petition for Writ of Certiorari filed by Petitioner this year. The first, which was filed in connection with the decision in Case v. CPC Intern., Inc., 730 F.2d 745 (Fed.Cir. 1984), was denied on October 1. See Case v. CPC International, Inc., ___ U.S. ___, 53 U.S.L.Week 3241 (October 1, 1984).

larity and fraud were considered and rejected by tribunals that had the opportunity to observe his demeanor and assess his credibility.

Similarly, his Rule 60(b) motion, appeal therefrom, and petition for writ of mandamus were properly decided under the applicable F.R.Civ.P. 60(b) standards and criteria.* As the Court of Appeals stated, lack of notice of judgment is not by itself a ground for extending the time for appeal. See F.R.Civ.P. 77(d). Instead, whether or not a failure to appeal because of lack of notice will be

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* See, e.g., Alamo Chemical Transp. Co. v. M/V Overseas Valdes, 726 F.2d 1073, 1074-75 (5 Cir. 1984); Sherrill v. Sou-Tex Chemical Co., Inc., ___ F.2d ___, 35 F.R.Serv.2d 67, 68 (4 Cir. 1982); Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 229-30 (4 Cir. 1981); Scola v. Boat Frances, R., Inc., 618 F.2d 147, 152, 155 (1 Cir. 1980); In re Morrow, 502 F.2d 520, 522 (5 Cir. 1974). See also Mizell v. Attorney General of State of N.Y., 586 F.2d 942, 944-45 n.2 (2 Cir. 1978), cert. denied 440 U.S. 967 (1979).

excused, by vacating and reentering judgment, depends upon such traditional F.R.Civ.P. 60(b) factors as diligence of the appealing party and prejudice to the other parties. With these criteria in mind the Court of Appeals properly reviewed the District Court's actions for abuse of discretion* and found none. The Court of Appeals also correctly stated that a writ of mandamus "cannot be used as a substitute for appeal...." 737 F.2d at 1035.**

No issue of the constitutionality of Rule 77(d) was implicated in the briefs before the Court of Appeals. No such constitutional issue was raised by that Court's decision.

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* See, e.g., Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 263 n.7 (1978); Hensley v. Chesapeake & O. Ry. Co., 651 F.2d 226, 231 (4 Cir. 1981).

** See Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34-35 (1980).

There is no "special and important" reason for this Court to reexamine any of the lower courts' determinations here. See Rule 17.1 of the Rules of the Supreme Court of the United States. Petitioner has had his day in court, and more. Justice now requires that this litigation come to an end.

III. CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

October 18, 1984

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APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LESLIE C. CASE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 75-5033-T
	*	
BASF WYANDOTTE AND NATIONAL GYPSUM COMPANY,	*	
	*	
Defendants	*	

MEMORANDUM

TAURO, D.J. August 31, 1983

Plaintiff, Dr. Leslie C. Case, has sued the defendants, BASF Wyandotte (BASF) and the National Gypsum Company for patent infringement and has sued BASF for alleged antitrust violations. Case charges that a number of specific claims found in his patent, United States Patent 3,483,169 (169 patent), have been directly infringed by BASF, and that claims in his patent, United States

Patent 3,502,601 (601 patent), have been contributorily infringed by BASF. He further charges National Gypsum with direct and contributory infringement of claims under the 601 patent. In addition, he avers that BASF, in violation of antitrust laws, conspired with National Gypsum and sold its infringing products to National Gypsum at lower than market prices, thereby injuring Case.

A six day bench trial was held on this matter. The issues of liability and damages were bifurcated. Presently before the court is the question of whether plaintiff has proven liability on the part of defendants.

I.

A. The 169 patent describes copolymers having both ester and ether linkages in substantial quantity and in

substantially random distribution within the polymer chains, with the ether linkages occurring in sequences of varying length.[1] These copolymers are claimed to have a lower viscosity than those that had been previously invented. This lower viscosity made these copolymers or polyols easier to pour and process than previously invented polyols.

According to Case, the 169 patent also describes and claims a novel process for the production of the copolymer products of the 169 patent. The process requires the reaction of a cyclic anhydride, an epoxide, and a "starter" under specific conditions which include the absence of a strongly basic compound. In addition, Case asserts that a number

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[1] U.S. Patent 3,483,169 (169 Patent) (Plaintiff's Exhibit 1a) Column 2, lines 25-32.

of applications of the 169 patent are possible including the creation of rigid urethane foams, flexible urethane foams, flexible urethane polyols, unsaturated polyester resins, alkyds for paints and similar resins, plasticizers for polyvinyl chloride, ternary polymers, epoxy curing agents, and water-soluble furniture and floor polishers.

B. The 601 patent relates to the use of polyols prepared by the processes described in the 169 patent, to make specific rigid polyurethane foams. The 601 patent claims are "product by process" claims and correspond closely to the process claims of the 169 patent. Case claims that certain non-obvious, desirable results can be obtained from the production of polyurethane foams by the use of the process described in the 169 patent. In particular, he introduced a

letter from the National Gypsum Company indicating that they found extremely good humid aging in a foam made from a 169 patent polyol.[2]

Defendants take a different view of the 601 patent. They assert that the patent does no more than describe a conventional method of creating a polyurethane foam from a reaction between a polyol and a polyisocyanate. In their view, the only distinguishing characteristic of the resulting polyurethane from the prior art is that it is prepared with Case's polyol.

II

Case has charged BASF and National Gypsum with appropriating the essence of his patents as well as with infringing specific claims in each patent.

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2 Transcript 5-128, 129.

In order to better define the essence of his patents, Case described them as:

> (1) a polyurethane polyol containing a substantial content of polyester segments or residues derived from halogenated cyclic anhydride, together with a substantial content of polyether segments or residues derived from an epoxide, and
>
> (2) rigid polyurethane foams prepared therefrom.[3]

According to Case, halogenated ester residues were used to provide flame retardancy in the polyurethane foam and the ether segments served to lower the viscosity of the underlying polyol.

More particularly, Case testified that a number of BASF's products specifically infringed his patents. He testified that PLURACOL Polyol 477, a

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[3] Plaintiff's Proposed Findings of Fact, p.6.

BASF product infringes product claims 35 and 36 of the 169 patent as well as claims 23 through 27, 12, 14 and 48. In addition, by the doctrine of equivalence, claim 28 of that patent is infringed by Polyol 477. Case further testified that insofar as PLURACOL Polyol 529 is a blend of Polyol 477, and that Polyol 622 is a blend of Polyol 529, both Polyols 529 and 622 infringed the patent to the same degree as Polyol 477. Case also claimed that BASF component systems 601R and 602R infringe the 169 patent. Finally, he asserted that BASF Polyols 453, 463 and 441 all infringed claims 34 and 36 of the 169 patent, and claims 26 through 28 by the doctrine of equivalence.

As for the 601 patent, Case testified that claims 1, 2, 3, 10, 11,

12, 15 and 38 were infringed by Polyols 477, 441, 453 and 463.

III

BASF and National Gypsum deny infringing specific claims of Case's patents. They argue that Case's patents are obvious as compared to the prior art and, thus, unpatentable, and are rendered invalid by anticipation. Further, they take the position that in claiming infringement of the essence of his inventions, Case seeks to have the court ignore critical limitations placed on the patents by the Patent Office prior to their approval.

At trial, BASF attempted to support its position by demonstrating significant differences between its own products and the patents in suits.

Dr. John T. Patton, testifying as an expert on behalf of BASF, first provided a general description of the BASF process for making polyols. Patton pointed out that whereas the 169 patent is essentially a one-step process which creates copolymers with a random distribution of ester and ether segments, the BASF polyols are made in a multi-step process and have an ordered structure. PLURACOL Polyol 453, for example, was prepared by charging a reaction vessel with Polyol 180-S, tetrabromophthalic anhydride, tetrachlorophthalic anhydride and sodium acetate. The reaction vessel was heated to 80° Centigrade. At this stage of the process, most of the Polyol 180-S and anhydride reacted. Propylene oxide was then slowly and continuously added over a three hour

period in order to cap the acid end formed by the reaction between Polyol 180-S and the anhydride.

A. In addition to describing the general differences between its own products and processes and those of the patents in suit, BASF sought to show specific distinctions. BASF first explored the way in which the 169 patent dealt with the presence of strongly basic compounds in the reaction process. The 169 patent provides:

> To produce the instant copolymers it is also essential that strongly basic compounds be completely excluded. The reaction mixture should advisably contain less than a about a hundred, and preferably less than ten, and more preferably less than five parts per million by weight of strongly basic substances. . . .[4]

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[4] 169 Patent Col. 4, lines 8-12.

The patent further indicates, and Case so acknowledged at trial, that the presence of any strongly basic catalyst in the process creates polyols with fewer ether groups, higher viscosity, and decreased flame retardance.

At trial, Case agreed that sodium acetate was an example of the sort of strongly basic catalyst which must be excluded under the terms of the 169 patent. He also testified on cross-examination that all claims in suit under patents 169 and 601 (with the exception of claim 39 in the 601 patent) require that the process for making polyols be carried out in the absence of a strongly basic catalyst.

By contrast, the BASF process for producing its polyols utilized a strongly basic compound, sodium acetate,

as a catalyst. Patton testified that in preparation of PLURACOL Polyol 453, 500 parts per million of sodium acetate remained as a catalyst in the chemical reaction after all the sulfuric acid in the tetrabromophthalic anhydride had been neutralized. In the making of PLURACOL Polyol 441 and 477, over 800 parts per million of sodium acetate remained to serve as a catalyst. These amounts are five to eight times greater than the maximum limits set by the 169 patent.

At trial, Case was unable to satisfactorily explain away the presence of sodium acetate in the BASF process. On re-direct examination, Case testified that if a strong base were used as a

catalyst in the preparation of PLURACOL Polyol 477 or 453, the effects would be minimal in terms of increased viscosity, compatability, and flame retardancy, "assuming it acts as a catalyst and doesn't do something else."[5] Still, in the BASF process, the sodium acetate does more than act as a catalyst. It is first used to neutralize the sulfuric acid in the tetrabromophthalic anhydride. Only after neutralizing the acid does it serve as a catalyst. In any event, Case's testimony did not explain the significant amount of sodium acetate present in the BASF process in contradistinction to the clear proscription against such compounds in the 169 patent.

B. BASF raised another distinction between the 169 patent and its own

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5 Tr. 3-115.

products. The 169 patent provides, and Case agreed at trial, that the polyols of the patent are produced by reacting together in "intimate admixture" the polymerization starter, the anhydride and the epoxide.[6] The term "intimate admixture" means that the reactants are mixed together so that they are actually in contact in solution. While the 169 patent provides that the reactants should all be combined initially, it also indicates that they may be added in "several sizable portions."[7] At the same time, the patent specifically warns against the addition of the epoxide in a series of small steps. "It should be clearly emphasized, however, that the copolymers of this invention cannot be produced, if

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6 Tr. 3-44.

7 169 Patent Col. 19 lines 35-36.

the polymerization is run under such conditions that the cyclic ether concentration is always low -- that is, if the epoxide is added dropwise to the reaction mixture -- . . . ."[8]

Here again, BASF's process for making its own polyols differs. The reactants were not added in intimate admixture during much of the copolymerization. Patton testified that as to PLURACOL Polyol 453, the epoxide, propylene oxide, was added in continuous or incremental fashion over a three-hour period. It was added after the polymerization starter had reacted with the anhydride. This continuous addition was employed in order to control the temperature of the reaction, and to minimize the formation of polyether segments.

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8 169 Patent Col. 3 lines 47-60.

The same process is used to produce PLURACOL Polyols 441 and 477.

In cross-examining Patton, Case pointed out that at certain points his patent did, in fact, contemplate continuous addition of reactants. He directed Patton's attention particularly to column 12 lines 39 through 42 and example 14 of the patent. These passages, however, do not lend support to Case's rebuttal argument. Column 19 of the patent seems to indicate that dropwise addition of epoxide results in the production of an essentially pure polyester with a "vanishingly small proportion of ether linkages present".[9] Further, in example 14 of the patent, reference is made to continuous addition of all the reactants, not just the epoxide.

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[9] 169 Patent Col. 19, lines 52-55.

In the BASF process, only the epoxide is added in a continuous manner.

The BASF process differs from the 169 patent's requirement of "intimate admixture" in another way. It is a multi-step process and, thus, not all of the reactants are in solution at the same time. For example, in making PLURACOL Polyol 477, pentaerythritol is used as a polymerization starter. But, as Case agreed at trial, contrary to the requirement of the 169 patent, the pentaerythritol starter was never in intimate admixture with the anhydride.[10]

C. There are three other specifications in the 169 patent which differ from the BASF products. These are the ratio of epoxide to anhydride combined in the copolymer chains (R/R'), the

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10 Tr. 3-45.

average degree of polymerization, and the length of ether segments between the anhydride and the last hydroxyl ("n"). Under claim 12 of the 169 patent (and claims 14 and 48 which refer to claim 12), the average degree of polymerization of ether segments must be at least 1.5. Claims 26 and 27 require "n" to be at least 1.5 and the average degree of polymerization also to be 1.5. Claims 28 and 33 require "n" to be 2. Claims 35, 36 and 52 require "n" to be at least 1.5 and R/R' be at leat 2.

Once again, these specifications provide a basis for distinguishing the BASF products from the patents in suit. In PLURACOL Polyol 453, the value of R/R' was a maximum of 1.15. The maximum value of "n" and the maximum value for the average degree of polymerization was 1.15. In PLURACOL Polyols 441 and

477, the values of R/R', "n", and the average degree of polymerization were all below 1.5.

D. Because the 601 patent utilizes the polyols described in the 169 patent, the 601 patent is distinguishable from the BASF products. Again unlike the claims of the 601 patent, BASF's polyols were not made in the absence of a strongly basic catalyst, nor were the polymerization starter, anhydride, and epoxide in intimate admixture during the reaction. Finally, Patton testified that the required copolymerization of 2 to 6 moles of epoxide per mole of anhydride did not occur in the BASF process.

V

Every element of a claim charged to be infringed must be found in the allegedly infringinging device, and

the omission of any one element precludes infringement. Graphicana Corp. v. Baia Corp., 472 F.2d 1202 (6th Cir. 1973); See Gaddis v. Calgon Corp., 506 F.2d 880 (5th Cir. 1975); Teledyne McCormick Selph v. U.S. 558 F.2d 1000 (Ct.Cl. 1977). A review of the evidence in this case reveals that some elements of the claims which Case charges have been infringed are not fuond in the BASF polyols. The patents in suit specifically provide that strongly basic compounds must be excluded from the process or, at least, not exceed 100 parts per million. The BASF polyols exceed these limitations several fold. Indeed, the presence of a strongly basic catalyst seems to be a central feature of the BASF process for making polyols.

Further, Case's patents call for intimate admixture of the reactants and addition of the epoxide immediately or in a small number of large batches. BASF has demonstrated that its own reactants are not intimately admixed. In fact, in the making of PLURACOL Polyol 477, the polymerization starter is never in contact with the anhydride. The BASF polyols are made by continuous dropwise addition of epoxide to the chemical reaction. Case's 169 patent specifically teaches against such incremental addition of epoxide (except in one specific example where all reactants are added on a continuous basis).

The patent claims in suit call for the values of R/R', "n", and the average degree of polymerization all to be at least 1.5. In the BASF polyols, none of these values are as great as

1.5, and many are as low as 1.15. Thus, not every element of the claims charged to be infringed is found in the BASF process, and the BASF process differs significantly from the patents in suit. The BASF products and processes do not literally infringe the patents in suit.

Case takes the position that even if the court finds that his patents are not literally infringed by BASF, the essence of the patents has been illegally appropriated and, by the doctrine of equivalence, BASF has committed infringement. Under that equitable doctrine, the test for equivalence requires only that the infringing product, "perform substantially the same work in substantially the same manner to achieve substantially the same result." Colortronic Reinhard & Co. v. Plastic Controls, 668 F.2d 1 (1st Cir. 1981) (citations

omitted). Case's patents, however, do not meet this test.

The differences between the patents in suit and BASF's products as noted above cannot be easily dismissed. In fact, Case represented to the Patent Office that some of these differences distinguished his invention from the prior art. First, Case used the requirement that strongly basic compounds be absent from his process to differentiate his invention from United States Patent 2,779,783 (the Hayes Patent) and United States Patent 3,254,060 (the Connolly Patent). Second, Case used the 169 patent's teaching about large batch addition of epoxide to distinguish his invention for United States Patent 3,089,863 (the Hicks Patent) which taught dropwise addition.

Case cannot claim that these distinctions are critical for the purposes of claiming non-obviousness over the prior art at the Patent Office, and then expect the court to ignore or minimize these differences by applying the doctrine of equivalence. "Claims that have been narrowed in order to obtain the issuance of a patent by distinguishing the prior art cannot be sustained to cover that which was previously by limitation eliminated from the patent." Graham v. John Deere Co., 383 U.S. 1, 33 (1966).[11] In short, BASF's products and processes do not perform substantially

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[11] If the court were to accept a very generalized description of the allegedly infringed claims under the doctrine of equivalence, it is quite likely that Case would be unable to overcome BASF's argument that the patents are invalid by reason of anticipation and obviousness as compared to the prior art.

the same function, in substantially the same manner to achieve substantially the same results as the patents in suit.

In view of these findings, the court holds that BASF Wyandotte has not infringed the 169 patent nor has it contributorily infringed the 601 patent. In addition, the court holds that National Gypsum Company has not directly or contributorily infringed the 601 patent. Case has simply failed to sustain his burden of proof as to any alleged infringement. In light of these holdings, the court need not pass on BASF's challenge to the validity of the patents.

VI

Case has also charged BASF with violating antitrust laws. Case alleges that BASF sold polyols to National Gypsum at an artificially re-

duced price and, thereby, prevented Case from supplying his polyols to National Gypsum. As an initial matter, there is a serious question as to whether Case has standing to assert such claims under § 4 of the Clayton Act, 15 U.S.C. § 15. At trial, Case acknowledged that he never signed a lease for a manufacturing facility, never had a reaction vessel suitable for producing commercial volumes of polyols and did not have other equipment necessary for manufacturing polyols such as vacuum pumps, liquid pumps, or liquid holding tanks. Nor did he make arrangements with the only supplier of tetrabromophthalic anhydride, Michigan Chemical, to obtain that chemical, necessary to his proposed manufacturing process.[12]

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12 Tr. 3-62-64.

Case, in sum, was totally unprepared to produce commercial quantities of his polyols. It is difficult to imagine, therefore, how Case could have been injured by any alleged antitrust violations engaged in by BASF. Still, under the broad reading of § 4 of the Clayton Act given by the Supreme Court in Blue Shield of Virginia v. McReady, 50 U.S.L.W. 4723 (June 21, 1982), this court is reluctant to find that Case's alleged injury is too remote or incidental from the alleged antitrust violation.

The evidence adduced at trial did not support Case's theory. Case did no more than show that varying companies paid varying prices for blended or unblended polyols. He purported to show that Witco Company paid more for a blended polyol than National Gypsum paid

for an unblended polyol in 1973. On cross-examination, however, Case conceded that the amount realized by BASF on a unit basis from the sale to National Gypsum exceeded the amount realized on the sale to Witco.[13]

Throughout his testimony, Case admitted that he was not certain of the exact meaning of the documents which reflected the prices of the polyols and even characterized part of his own testimony as an "educated guess."[14] Case repeatedly testified that certain price differentials looked suspicious to him. These suspicions and the rest of Case's highly speculative testimony were not reinforced by credible evidence. Case

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13 Tr. 3-91.

14 Tr. 3-88.

could show no conspiracy, price discrimination, or any intentional or unintentional antitrust violations by BASF or National Gypsum. The court finds that Case has not sustained his burden of proof on the charges of antitrust violations, and that he has failed to show that BASF either attempted to or actually engaged in monopolization in violation of § 2 of the Sherman Act.

An order will issue.

s/s _____
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LESLIE C. CASE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	CA 75-5033-T
	*	
BASF WYANDOTTE AND NATIONAL GYPSUM COMPANY,	*	
	*	
Defendants	*	

ORDER

TAURO, D.J. August 31, 1983

For the reasons stated in a memorandum issued this date, judgment is hereby entered in favor of the defendants on all counts.

It is so ORDERED.

s/s _____
United States District Judge